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No. 82-1531

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

IN RE:

GRAND JURY PROCEEDINGS

BANK OF NOVA SCOTIA,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITIONER'S REPLY BRIEF

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Pursuant to Sup. Ct. R. 28.1, a list of Petitioner's parents, subsidiaries and affiliates appears as Appendix I to the Petition for Certiorari.

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## PETITIONER'S REPLY BRIEF

The Bank of Nova Scotia ("Petitioner") submits this Brief in reply to the Brief for the United States in Opposition, filed by the Department of Justice ("Respondent") on May 25, 1983.

The Petition for Certiorari (the "Petition") presents for review an important and pressing question of federal law that has not been, but should be, answered by this Court. The importance of the question and the fact that it has not been answered by this Court are not challenged. The Petition is opposed on the ground that an alternative question which Respondent proposes does not deserve an answer.

The Petition seeks a determination by this Court of the extent to which a foreign national, subject to the judicial power of the United States only by reason of its lawful presence within the territory of the United States, should be coerced to act unlawfully in the territory of a friendly foreign sovereign, when there has been no showing that the national interest of the United States requires such unlawful action, and when alternative means of serving the national interest are available. The Brief in Opposition does not address this question but seeks to preclude this Court's consideration of it by arguing only that the judicial power exists. The existence of power is not an issue; what constitutes abusive or excessive exercise of power is an issue that requires resolution by this Court.

The question presented for review is framed by the following facts, which are uncontroverted in the record.

1. Petitioner is a Canadian national which maintains establishments for the transaction of a banking business in the United States and in the Bahamas. The conduct of those establishments is controlled by the laws of the respective territorial sovereigns.

2. A federal grand jury is conducting a tax and narcotics investigation in the Southern District of Florida. Petitioner is not a target of that investigation and is not shown or alleged to have had any involvement in the United States with the targets of the investigation or the matters under investigation.

3. The grand jury subpoena in question commands Petitioner to remove from its establishment in the Bahamas and produce in the United States records of accounts maintained in accordance with Bahamian law by targets of the investigation with the Nassau branch of Petitioner.[1] Compliance with the subpoena would require Petitioner to take action in the Bahamas with respect to material physically situated in the Bahamas.

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1 One of the targets is stated to be a citizen and resident of the United States. The nationality and residence of other targets are not disclosed.

4. Compliance with the subpoena is explicitly prohibited by Bahamian law governing the conduct of Petitioner's establishment in the Bahamas.

5. Under Bahamian law, a court in the Bahamas may authorize compliance with the subpoena. Application for such authorization may be made by the United States Government, but there is no procedure by which Petitioner can make such application.[2]

6. Respondent has made no showing that the material sought is relevant or necessary to the grand jury investigation or would be admissible evidence of any crime. Respondent has obtained no order directing a target of the investigation to produce the material. Respondent has made no application to a court in the Bahamas to authorize production. Petitioner has sought the consent of the customers of its Bahamas branch to production; consent was refused.

The Petition shows that, in these circumstances, imposition of contempt penalties by the courts below is a departure from principles declared by this Court, is in conflict with the decisions of other circuits, and creates confusion. No contrary showing is made by the Brief in Opposition. As shown hereafter, Respondent misconstrues the effect of prior decisions by this Court, fails to reconcile the disparate views of the courts of appeal, disregards the record, and presents no credible answer to the plea of Petitioner and others similarly situated for a clear statement of the rules they are required to follow.

A. *The Conflict of the Circuits.* There is no force to Respondent's argument (Govt. Brief p. 9) that the courts of appeal agree that "this issue should be decided by application

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2 Bahamian law and procedure is described by qualified Bahamian counsel. (*See* Graham Aff., Pet. App. 1h-4h). That evidence is consistent with the description of Bahamian law provided by the Attorney General of the Bahamas in the *Amicus* Brief submitted in support of the Petition by the Commonwealth of the Bahamas. The record contains no contrary evidence. The courts below accepted the evidence introduced by Petitioner.

of the Restatement's five-factor balancing test." The divergent decisions of the circuits sufficiently evidence the fact that the test is neither uniformly interpreted nor consistently applied. By way of illustration, one factor, "vital national interests of each of the states", requires definition in the context of cases such as the present one. The United States has a vital national interest in the grand jury system, but an invasion of foreign sovereignty based on speculation as to the possible relevance of documents to a grand jury investigation can scarcely be said to be essential to the function of the system or to a vital national interest of the United States. The vital national interest of the Bahamas is in the preservation of its rules of internal order; it is that interest that should be weighed against the zealous impatience of a U.S. prosecutor with Bahamian laws he finds obnoxious in a particular case.

Respondent refers to no case, nor are we aware of any, in which this Court has adopted Section 40 of the *Restatement (Second) of Foreign Relations Law of the United States* (1965) as an appropriate standard. Its insufficiency in the context of cases such as this one is evidenced by the most recent, proposed revision of the *Restatement of Foreign Relations Law of the United States (Revised)* (Tent. Draft No. 3, 1982).[3]

Respondent's effort to reconcile the divergent decisions of the courts of appeal is equally ineffective. The plain fact is that

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3 The most recent draft of the *Restatement* directs courts to consider the following factors in determining whether to enforce an extraterritorial subpoena:

> In issuing an order directing production of documents or other information located abroad, a court in the United States must take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

*Restatement of Foreign Relations Law of the United States (Revised)* § 420(1)(c) (Tent. Draft No. 3, 1982).

the Seventh Circuit relieves a witness when compliance with the subpoena would require it to violate the laws of a friendly foreign country, *United States v. First National Bank ("Tripplett")*, 699 F.2d 341 (7th Cir. 1983); the Eleventh Circuit requires compliance. The Third and Tenth Circuits require a showing of relevance to enforce a subpoena, *In Re Grand Jury Proceedings ("Schofield I")*, 486 F.2d 85 (3d Cir. 1973); *In Re Grand Jury Proceedings ("Schofield II")*, 507 F.2d 963 (3d Cir.), *cert denied*. 421 U.S. 1015 (1975); *In Re Grand Jury Subpoena Duces Tecum ("Dorokee")*, 697 F.2d 277 (10th Cir. 1983); the Eleventh Circuit does not. The Second Circuit accepts the proposition that, in cases involving an international conflict of laws, the applicant for the relief bears a heavy burden of demonstrating a preponderant national interest requiring what is recognized to be extraordinary action, *United States v. First National City Bank ("Loveland")*, 396 F.2d 897 (2d Cir. 1968); *Application of Chase Manhattan Bank ("Chase")*, 297 F.2d 611 (2d. Cir. 1962); the Eleventh Circuit will disregard the judicial impingement on international relations on the basis of a prosecutor's generalities.

Respondent concedes that the Seventh Circuit found a bank's status as a "neutral" party "significant" (Govt. Brief at 11), and was influenced by the Bank's efforts to comply with the subpoena. (Govt. Brief at 10). In the instant case, in which Petitioner is not accused of any wrong-doing[4] and has made a good-faith effort to comply with the subpoena[5], it must be

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4 Respondent raises for the first time the argument that "it is hardly clear that petitioner is a completely neutral party." (Govt. Brief at 11, fn. 15). It claims that Petitioner may be "aware" that "at least some of its American customers" may use its Bahamian branch to take advantage of the Bahamian bank secrecy statute. Respondent did not raise this argument below, and presents no evidence in support of this rather tenuous proposition. The record shows that Petitioner is a neutral party and has no "purposeful involvement" in the subject of the grand jury's investigation.

5 Respondent concedes that, at the time of the contempt hearing, Petitioner had sought and not obtained the customer's consent to the release of the documents. (Govt. Brief at 8, fn. 9.) In addition, it relied on the advice of Bahamian counsel that there was no basis in Baha-

acknowledged that the Seventh Circuit utilized standards which were quite different in purpose and effect from those applied by the Eleventh Circuit herein. Indeed, Respondent's argument does not reconcile the Eleventh Circuit's opinion with *Tripplett*, but rather reveals the disparate rationales used by the two circuits.

Similarly, respondent has failed to reconcile the conflicts between the Third and Tenth Circuits and the decision below. Respondent concedes that, based on the *Schofield* rule, the Third Circuit would "exercise a greater degree of supervisory power over the conduct of grand jury proceedings" than would the Eleventh Circuit, but attempts to gloss over this difference by claiming that the Third Circuit's standards are not "constitutionally required". (Govt. Brief at 13-14). Respondent claims that "this Court need not reconcile this particular conflict" (Govt. Brief at 14), but it does not and cannot deny that there is a real conflict between the Eleventh and Third Circuits, and that an application of the Third Circuit's standards in this matter would have changed the outcome of the contempt proceedings herein.[6] Respondent virtually ignores the fact that

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mian statutory or common law which would permit an application by Petitioner for the release of the documents. (Graham Aff., Pet. App. 3h, ¶ 6). In contrast, Respondent concedes that it has the ability to apply to a Bahamian court for an order permitting the release of the documents, but it has failed to do so. Respondent claims that it is not required to show that the information sought by a grand jury subpoena is unavailable through other means, and cites *United States v. Mara*, 410 U.S. 19, 21 (1973), *United States v. Dionisio*, 410 U.S. 1, 17 n. 16 (1973) and *In Re Liberatore*, 574 F.2d 78, 83 (2d Cir. 1978) in support of this proposition. (Govt. Brief at 15). In fact, none of the cases cited by Respondent concerns the enforcement of an extraterritorial subpoena, or the enforcement of any subpoena which would subject the witness to criminal penalties in another jurisdiction. In the instant case, Petitioner has done everything in its power to procure the documents through legal channels, and Respondent has shown an unwillingness to procure the documents through a route which is undeniably available to it.

6 Respondent contends that its disclosure that the "grand jury is conducting a tax and narcotics investigation" would have fulfilled the standards set forth by the Third Circuit in *Schofield II* since

the Tenth Circuit has recently adopted the *Schofield* requirements. It claims, "[T]he Tenth Circuit has cited [*Schofield*] without discussion". (Govt. Brief at 13). An honest reading of *Dorokee*, however, reveals that the Tenth Circuit required the government to make a "preliminary demonstration that the material sought is relevant to a proper grand jury investigation". *Id.*, 697 F.2d at 281. That standard, adopted by both the Third and Tenth Circuits, is in stark conflict with the rationale of the court below.

In addition, Respondent does not attempt to reconcile the Second Circuit's rationale in *Loveland* or *Chase* with the decision below, claiming without any explanation that the Second Circuit has "receded" from its position.[7] (Govt. Brief at 10, fn. 13). Respondent's brief serves to highlight the irreconcilable conflict between the decisions of the Seventh, Third, Tenth and Second Circuits and the decision below.

B. *Conflict with Prior Decisions of this Court.* The unmistakable effect of the decision by the court below is to punish Petitioner for its failure to act in the Bahamas in a manner which federal law would not permit it to act, *mutatis mutandis*, in the United States. The decisions of this Court, cited and

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"[b]anking records are essential to a complete tracing of funds. . . ." (Govt. Brief at 14.) Such a general statement by Respondent could not possibly have fulfilled the *Schofield II* standards, which require a particularized showing of relevance *in each case*. *Id.*, 507 F.2d at 966. Respondent's affidavit in this matter was filed under seal and was not considered by either the district court or the court of appeals below, (Govt. Brief at 14, fn. 20) and so is not properly before this Court.

7 In *Loveland*, the Second Circuit expressly stated that compliance with the subpoena would not "require the violation of the criminal law of a foreign power" nor "conflict with the public policy of a foreign state as expressed in legislation", 396 F.2d. at 901, and observed that the German government "voiced no opposition to Citibank's production of the subpoenaed records." 396 F.2d. at 904. In this case, the courts below expressly recognized that compliance with the subpoena would involve a *prima facie* violation of Bahamian criminal law, and the Commonwealth of the Bahamas has vehemently voiced its opposition. *See Amicus* Brief at 3-9.

discussed at pp. 6-8 of the Petition, establish a principle of equality of treatment. It is this principle that is offended by the decision of the courts below which orders Petitioner to do in the Bahamas what it would not be permitted to do in the United States pursuant to order of a Bahamian Court. The inequity of the position taken by the courts below was not lost on the Government of the Commonwealth of the Bahamas. (*Amicus* Brief at 8-9; Pet. at 5).

The Brief in Opposition does not question the departure from principle. It seeks to distract the Court by a semantic, but not an analytical, discussion of the act of state doctrine. Contrary to Respondent's contentions, Petitioner has never contended that the decision below violated the act of state doctrine *per se* or that *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers ("Rogers")*, 357 U.S. 197 (1958) constituted an "absolute bar to summons enforcement and contempt sanctions." (Govt. Brief at 7.) Petitioner simply noted the evident fact that, as a corollary to the act of state doctrine, this Court has expressed extreme reluctance to enter any order which would obligate a party to commit an act in a foreign country in violation of the laws or public policies of that nation. (Pet. at 6.) *Accord, United States v. First National City Bank ("Omar")*, 379 U.S. 378, 384-85 (1965) (majority noted that, if it were shown that the decision was in violation of foreign law, the district court should review the advisability of its order). Thus, the decision below is at odds with the principle of respect for territorial integrity.

In these circumstances, it is impossible for laymen to know the laws that they are required to obey. It is impossible for their legal advisors to provide positive and certain counsel. There are no clear or certain standards by which a company doing business in this country can predict the legal ramifications of its conduct, and there are no clear or certain standards by which a court may judge the propriety of that conduct.

*C. The decision below will impede rather than facilitate grand jury investigations.* In this case, Respondent and the court below have emphasized the need to facilitate investiga-

tion and prosecution of violations of United States law. That interest, we submit, is clearly compromised by the absence of any definitive statement by this Court. Petitioner, and those similarly situated, will be required to litigate subpoenas such as that in this case in order to obtain whatever protection is available on the grounds of comity, sovereign compulsion and due process.

The resolution of this issue is in the interest of Respondent as well as that of Petitioner. Respondent has cited a number of cases, including *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972), *United States v. Calandra*, 414 U.S. 338, 343 (1974) and *Blair v. United States*, 250 U.S. 273, 282 (1919), in support of the proposition that grand jury investigations are extremely important and should not be subject to unnecessary and unreasonable restraints. (Govt. Brief at 12). Petitioner agrees with this proposition, but points out that the uncertainty surrounding the standards to be utilized in enforcing extraterritorial subpoenas results in greater obstruction of grand jury investigations than would the application of virtually any set of standards authoritatively established by this Court. Litigation on the enforceability of each extraterritorial grand jury subpoena imposes a burden that cannot be justified either monetarily or in the interest of judicial economy. Petitioner and others similarly situated have no guidelines by which they can determine which extraterritorial subpoenas represent a proper exercise of judicial power. The court below asserted, "[W]e are not willing to emasculate the grand jury process. . .", (Pet. App. at 13a), but it has exacerbated the confusion in the area to such an extent that its decision will create quite the opposite effect.

D. *The lower courts lack needed guidance.* The standards adopted by various circuits for the enforcement of extraterritorial subpoenas are in sharp disagreement. Respondent's Brief in Opposition fails to reconcile the conflicting views of the Eleventh, Seventh, Second, Third and Tenth Circuits. It is difficult to conceive of a more appropriate exercise of this Court's power of supervision to resolve the incompatibility of decisions.

In this case, a noncitizen of this country, which is subject to process of our courts only because it lawfully conducts business here, is victimized by a conflict of sovereigns. Had this subpoena been issued in the Seventh, Second, Third or Tenth Circuit, we believe that the result would have been quite different. In the circumstances of this case, the courts below departed from the accepted and usual course of judicial proceedings by imposing contempt penalties.

**Conclusion**

The Petition seeks an answer to a question of federal law that has not heretofore been answered by this Court. The Brief in Opposition does not and cannot show that the question has been answered by this Court. The importance of the question is demonstrated by Petitioner, by the *Amicus* Brief submitted by the Commonwealth of the Bahamas in support of the Petition and by the most recent Tentative Draft of the *Restatement*. The Brief in Opposition does not contradict the importance of the question presented by the Petition. Instead, it seeks to persuade the Court that a significantly different question framed by Respondent does not merit an answer by this Court.

To give the question presented by the Petition its proper consideration, to answer recurring questions, and to render a fair and equitable decision, this Court should grant the Petition for Certiorari and reverse the decisions of the district court and court of appeals.

Dated: New York, New York
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